(8)

No. 03-1039

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Counsel for Petitioner

TABLE OF CONTENTS

	Page
A. The California Supreme Court Reasonably Found That *Boyde's* Holding That Factor (k), On Its Face, Called For Consideration Of Background And Character Evidence Applied Equally To Payton's Mitigating Character Evidence	3
1. Post-Crime Character Evidence Of Remorse And Rehabilitation Is An Inevitable Sentencing Consideration	4
2. Factor (k) "Naturally Read" Called For Consideration of Non-Crime Related Mitigation Evidence Such As Background and Character	9
B. The California Supreme Court Reasonably Applied *Boyde*'s "Context Of The Proceeding" Analysis And Concluded There Was No Reasonable Likelihood The Jury Was Misled Concerning The Consideration Of Payton's Mitigating Evidence	10
C. Any Error Was Harmless	14
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
Cases	
Boyde v. California 494 U.S. 370 (1990)	1-6, 10, 14
Brecht v. Abrahamson 507 U.S. 619 (1993)	14, 16
Calderon v. Coleman 525 U.S. 141 (1998)	15
Furman v. Georgia 408 U.S. 238 (1972)	7
Johnson v. Texas 509 U.S. 350 (1993)	8
Lockett v. Ohio 438 U.S. 586 (1978)	4, 6, 8
People v. Frierson 25 Cal. 3d 142 599 P.2d 587 158 Cal. Rptr. 281(1979)	7
People v. Gonzalez 51 Cal. 3d 1179 800 P.2d 1159 275 Cal. Rptr. 729 (1991)	7

TABLE OF AUTHORITIES (continued)

	Page
People v. Hernandez 47 Cal. 3d 315 763 P.2d 1289 253 Cal. Rptr. 199 (1988)	7
People v. Murtishaw 48 Cal. 3d 1001 773 P.2d 172 258 Cal. Rptr. 821 (1989)	7
Skipper v. South Carolina 476 U.S. 1 (1986)	2, 4, 5, 7, 8
Woodford v. Visciotti 537 U.S. 19 (2002)	11
Yarborough v. Alvarado 124 S. Ct. 2140 (2004)	9, 10, 14
Constitutional Provisions	
United States Constitution Eighth Amendment	3, 5
Statutes	
Cal. Penal Code § 190.3(k) § 190.3	7 7, 14

TABLE OF AUTHORITIES (continued)

	Page
Other Authorities	
Antiterrorism and Effective Death Penalty Act of 1996	1, 2, 11, 14
California Jury Instruction No. 1.00 (1979 Rev.)	12
Dennis N. Balske, *New Strategies for theDefense of Capital Cases*, 13 Akron L. Rev. 331 (1979)	6
Jeffrie G. Murphy, *Repentance, Punishment, and Mercy, in Repentance: A Comparative Perspective* 143, 157 (Amitai Etzioni & David E. Carney eds., 1997)	4, 8
Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1604-05 (1998)	4, 5, 8

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1039

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

As demonstrated in the State's opening brief, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires deference to the California Supreme Court's decision affirming Payton's death penalty because the California Supreme Court reasonably applied *Boyde v. California,* 494 U.S. 370 (1990), in finding that: (1) factor (k), on its face, directed the jury to consider Payton's mitigating character evidence of remorse and rehabilitation; and (2) there was no reasonable likelihood the prosecutor's misstatement concerning factor (k) misled the jury into believing it was precluded from considering Payton's evidence in deciding whether to impose life or death.

Payton's brief is notable, not for what it says, but for what it does not say. At no point does Payton address: (1) *Boyde's* holding that factor (k) is facially unambiguous and directed the

jury to consider non-crime related mitigation evidence such as background and character; (2) that no other decision, until the Ninth Circuit's in this case, had drawn a pre- and post-crime distinction concerning *Boyde's* holding that factor (k) facially directed consideration of non-crime related mitigation evidence such as background and character; or (3) the State's arguments demonstrating that the California Supreme Court's application of *Boyde* and its construction of factor (k) "standing alone" and in "the context of the proceedings" are consistent with numerous decisions of other courts, including this Court. Each of these points confirms the reasonableness of the California Supreme Court's decision and hence entitles the decision to deference under AEDPA.

What Payton's brief does say fails to establish that the California Supreme Court unreasonably applied *Boyde*. Payton properly distances himself from the Ninth Circuit's errant pronouncement that "*Boyde* does not control." Payton recognizes that the California Supreme Court reasonably relied on *Boyde*. His argument instead rests on three other fallacies that the Ninth Circuit had adopted. The first fallacy is that at the time of Payton's trial there was "no long held" societal belief that remorse or rehabilitation were relevant to culpability for purposes of sentencing. Payton maintains that the concept did not develop until this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986). The second fallacy is that factor (k), "naturally read," applied only to evidence related to "the commission of the crime," as opposed to "any other circumstance" that would counsel, in the appropriate circumstances, for a sentence less than death. The third fallacy is that the California Supreme Court, in applying *Boyde*, "failed to" consider the factual differences between the two cases or "the totality of the pertinent facts in the record."

As demonstrated in the State's opening brief and here, post-crime remorse and rehabilitation are an aspect of an offender's character that society has long considered in assessing culpability for purposes of punishment. *Boyde*

confirmed that factor (k) did not limit a jury's consideration of mitigation to circumstances related to the crime, but rather included circumstances of the offender such as his character and background. And the California Supreme Court considered all relevant facts and therefore reasonably applied *Boyde's* holding and principles in affirming Payton's death penalty judgment.

Payton's approach is akin to that of the Ninth Circuit; he examines the issue *de novo* and substitutes his own analysis without any of the mandated deference to the reasoned California Supreme Court decision. The California Supreme Court decision finding there was no reasonable likelihood the jury misunderstood factor (k) so as to preclude consideration of Payton's mitigating evidence was not only reasonable but correct. The Ninth Circuit's grant of habeas relief as to the penalty phase should be reversed.

A. The California Supreme Court Reasonably Found That *Boyde's* Holding That Factor (k), On Its Face, Called For Consideration Of Background And Character Evidence Applied Equally To Payton's Mitigating Character Evidence

As demonstrated in the State's opening brief, this Court in *Boyde* held that factor (k), on its face, comported with the Eighth Amendment's requirement that a sentencer be permitted to consider and give effect to any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death. *Boyde*, 494 U.S. at 378, 381-82; Pet. Br. 23-24. In doing so, the Court rejected Boyde's argument that factor (k) limited the consideration of mitigating evidence to circumstances *related to the crime* as opposed to *non-crime related* factors such as a defendant's background and character. *Id.* at 378, 382.

In his brief, Payton, like the Ninth Circuit majority, does not address this aspect of *Boyde's* holding. He instead argues

that at the time of his penalty trial in 1981, the law concerning what a jury was required to consider for purposes of capital sentencing was so unclear that regardless of what this Court said factor (k) meant when it construed it in *Boyde*, a jury at the time of Payton's sentencing would not have known it could consider Payton's post-crime character evidence of remorse and rehabilitation. Resp. Br. 18, 33-35. Payton also contends that factor (k), "naturally read," refers to circumstances related to the crime. Resp. Br. 24, 33. As demonstrated in the State's opening brief, he is incorrect on both counts. Consideration of post-crime character evidence of remorse and rehabilitation was and is an inevitable sentencing consideration. And, as this Court held in *Boyde*, factor (k) does not limit a jury's consideration of mitigation evidence to circumstances related to the crime; it includes non-crime related evidence such as background and character, which is precisely what Payton presented.

1. Post-Crime Character Evidence Of Remorse And Rehabilitation Is An Inevitable Sentencing Consideration

Payton's evidence of remorse and rehabilitation is character evidence that, in appropriate circumstances, would counsel imposition of a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 594, 604-05 (1978); *Skipper*, 476 U.S. at 4-9; *see generally*, Jeffrie G. Murphy, *Repentance, Punishment, and Mercy, in Repentance: A Comparative Perspective* 143, 157 (Amitai Etzioni & David E. Carney eds., 1997) ("The repentant person has a better character than the unrepentant person, and thus the repentant person–on this theory–simply deserves less punishment than the unrepentant person."); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1604-05 (1998) ("[I]f jurors believed that the defendant was sorry for what he had

done, they tended to sentence him to life imprisonment, not death.").[1/]

Jurors need not be versed in federal Constitutional law to apply a lesson ingrained since early childhood. Indeed, it is reasonable to assume that most juries to this day remain unaware of *Skipper, Boyde* or any of this Court's jurisprudence concerning what the Eighth Amendment requires in determining a sentence in a capital case. However, a juror at the time of Payton's trial and now would bring with him or her one of the earliest lessons of childhood, that remorse and prospects for rehabilitation may justify more lenient punishment. Every child learns by the time of kindergarten that an early apology will lessen the seriousness of a transgression and often lead to a reduced punishment. A punch in the nose followed by "I'm sorry," is far less grievous than the same act followed by silence. The concepts of remorse and repentance as relevant considerations in determining an appropriate punishment are imbued in our social fabric.

In an extensive study of the role of remorse in capital sentencing, Professor Theodore Eisenberg of Cornell School of Law confirmed what common sense tells us: even where remorse is not identified in the sentencing instructions as a mitigating factor jurors naturally consider a defendant's remorse when considering the appropriate punishment. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in*

---

1. As noted by Eisenberg, remorse may mitigate punishment in two ways. On the one hand, "its mitigating effect may be freestanding. On this account, remorse is the proper moral response to one's wrongdoing, and wrongdoers who experience remorse possess a quality of character that jurors rightly consider in mitigation." Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*,83 Cornell L. Rev. at 1604-05. On the other hand, remorse's mitigating effect may be derivative. "On this account, remorse is mitigating because it serves as evidence that the defendant, having made his first step on the way to rehabilitation, is less likely to be dangerous in the future." *Id.* at 1605.

Capital Sentencing, 83 Cornell L. Rev. at 1604-05 & n.25.[2/] Any jury interpreting California's instructions concerning the factors to be considered when determining punishment would have necessarily viewed those instructions in light of these common lessons learned from early childhood. Payton and the Ninth Circuit therefore incorrectly distinguish *Boyde* on the ground that, in contrast to pre-crime background evidence, there was no view, "long held by society," that post-crime character evidence can have a mitigating effect on sentencing.

Payton is also incorrect when he asserts that the law on this issue was unclear at the time of his sentencing. Resp. Br. 18. At the time of Payton's penalty trial, both federal and California law unquestionably called for the consideration of an offender's background and character and that consideration necessarily included the offender's post-crime character evidence of remorse and rehabilitation. In *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. The Court did not distinguish between pre- and post-crime character evidence. *Id.* at 594.

Payton mistakenly asserts that "*Lockett-type* evidence" was limited to "mitigating evidence that existed at the time of, and related to, the offense." Resp. Br. 20. In fact, Lockett's character evidence included post-crime acts such as a psychologist's positive "prognosis for rehabilitation if returned to society" and successful drug treatment. *Lockett*, 438 U.S. at 594. Thus, contrary to Payton's assertion, federal law at the time of Payton's sentencing did not distinguish between pre-

2. In footnote 25, Eisenberg cites an article from 1979 by Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L. Rev. 331, 356 (1979), which reminded defense counsel of the importance of a defendant's remorse to juries.

and post-crime character evidence when holding that character evidence is relevant and cannot be precluded from a capital sentencing decision.

California law at the time of Payton's sentencing similarly allowed for the consideration of a defendant's background and character for capital sentencing. Cal. Penal Code § 190.3 ("In the proceedings on the question of penalty, evidence may be presented by . . . the defendant as to any matter relevant to . . . mitigation, and sentence including, but not limited to . . . the defendant's character, background, history, mental condition and physical condition."), *reprinted in* Pet. App. 187. Section 190.3(k), from which Payton's factor (k) instruction was taken verbatim, was the embodiment of that principle. *People v. Frierson*, 25 Cal. 3d 142, 178, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (plurality) (construing "any other circumstance which extenuates the gravity of the crime" as an open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence); *People v. Murtishaw*, 48 Cal. 3d 1001, 1033, 773 P.2d 172, 258 Cal. Rptr. 821 (1989) (same).[3/] Consistent with this Court, California also did not distinguish between pre- and post-crime character evidence. *See, e.g.*, *People v. Hernandez*, 47 Cal. 3d 315, 355, 363, 365-67, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (defendant's character evidence, which included difficulty of life in prison, remorse and possibility of positive contribution in prison, fell within factor (k)); *People v. Gonzalez*, 51 Cal. 3d 1179, 1204, 1224-25, 1231-32, 800 P.2d 1159, 275 Cal. Rptr. 729 (1991) (defendant's character evidence included remorse).

Skipper, decided after Payton's sentencing, only reinforced the accepted notion that character evidence, whether pre- or post-crime, was a relevant and inevitable sentencing

3. Ironically, the defense bar initially challenged factor (k) as violative of *Furman v. Georgia*, 408 U.S. 238 (1972), because "it is so broad as to confer, in effect, unbridled discretion on the trier of fact with regard to penalty." *People v. Frierson*, 25 Cal. 3d at 142.

consideration. Indeed, the Court in *Skipper* expressly rejected the very argument advanced by Payton (Resp. Br. 23-24, 33) and the Ninth Circuit (Pet. App. 15-16), that pre-crime character evidence relates to an assessment of defendant's culpability for purposes of sentencing but post-crime character evidence does not. In *Skipper*, the State of South Carolina argued that past behavior in prison bears on a defendant's character and, therefore, is relevant evidence in determining the appropriate penalty, but that future adaptability to prison is irrelevant because it does not bear on a defendant's character, prior record, or the circumstances of the offense. *Skipper*, 476 U.S. at 6-7. This Court held: "This distinction is elusive. As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7;[4] *see also*, *Johnson v. Texas*, 509 U.S. 350 (1993) (Rejecting the petitioner's argument that consideration of future behavior is not the same thing as an assessment of moral culpability for the crime already committed; "Contrary to petitioner's suggestion, however, this

---

4. Pointing to the concurring opinion (Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist), Payton suggests that *Skipper* effected a sea change in the law. Resp. Br. 35 & n.6. The concurrence did question the mitigating effect of being a model prisoner, stating that "[s]ociety's interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence." *Skipper*, 476 U.S. at 14. But as the majority of this Court recognized in both *Lockett* and *Skipper*, society's interest in retribution is lessened, in appropriate circumstances, when a brutal murderer is remorseful and shows prospects for rehabilitation. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. at 1605 n.22 (citing Jeffrie G. Murphy, *Repentance, Punishment, and Mercy, in Repentance: A Comparative Perspective* at 157 (Explaining that remorse mitigates both in a deterrence framework by showing that the defendant is "less likely to commit crimes again" and in a retribution framework by showing that the defendant "has a better character.")).

forward-looking inquiry is not independent of an assessment of personal culpability."). Accordingly, at the time of Payton's sentencing, societal views and the law were in accord that an offender's post-crime character evidence of remorse and rehabilitation were relevant and inevitable sentencing considerations.

2. Factor (k) "Naturally Read" Called For Consideration of Non-Crime Related Mitigation Evidence Such As Background and Character

In his brief, Payton repeats the Ninth Circuit's argument that the words "gravity of the crime" contained in factor (k), "naturally read," refer to circumstances that relate to or ameliorate the crime itself. Resp. Br. 24, 33; Pet. App. 59 ("Most naturally read, the phrase 'extenuates the gravity of the crime' refers to evidence relating to or ameliorating the crime itself."); *see also*, Pet. App. 16 & n.9. But both flatly ignore the Court's holding in *Boyde* to the contrary.

This Court found factor (k) constitutional because, "standing alone," the instruction directed the jury to consider non-crime related evidence in mitigation, which certainly included Boyde's background and character. *See*, § A(1), *supra*, and Pet. Br. 23-24. And that specific rule is what the California Supreme Court was compelled to, and reasonably, followed. *See*, *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004) ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow."). The California Supreme Court was particularly reasonable given that the only evidence presented by Payton, like Boyde, was non-crime related mitigating character evidence.

Additionally, Payton's limited interpretation of factor (k) ignores the stage of the proceedings in which the instruction is given, namely, sentencing. At a penalty trial, where the

offender has already been found *culpable* for the death qualifying murder, "gravity of the crime" reasonably refers to the defendant's culpability for purposes of *sentencing*–not, as argued by Payton and the Ninth Circuit, for the *crime*. As demonstrated here and in the State's opening brief, jurors would naturally consider a defendant's remorse and rehabilitation in determining "the gravity of the crime" for purposes of sentencing. *See*, § A(1), *supra*, and Pet. Br. 26-30.

In the final analysis, given the holding in *Boyde* and jurors' natural inclination to consider post-crime character evidence in determining the appropriate punishment, it was at least reasonable for the California Supreme Court to find that factor (k), "standing alone," applied equally to Payton's mitigating evidence. Payton, like the Ninth Circuit, is "no where close to the mark" when he argues otherwise. *Yarborough v. Alvarado*, 124 S. Ct. at 2150.

B. The California Supreme Court Reasonably Applied *Boyde*'s "Context Of The Proceeding" Analysis And Concluded There Was No Reasonable Likelihood The Jury Was Misled Concerning The Consideration Of Payton's Mitigating Evidence

Payton, like the Ninth Circuit, concedes the California Supreme Court methodically tracked and applied *Boyde's* "context of the proceedings" analysis in determining whether there was a reasonable likelihood Payton's jury misunderstood the court's instructions so as to preclude consideration of his mitigation evidence. Resp. Br. 15-17, 32-33, 35-36, 39-40. Unlike the Ninth Circuit, however, Payton also concedes (properly) that *Boyde* is the most relevant Supreme Court decision for deciding his claim. Resp. Br. 29-30. He nonetheless maintains that the California Supreme Court's application of *Boyde* was unreasonable because it was "rote."

Payton claims that the California Supreme Court's application was "rote" because it "failed to consider" "pertinent facts" in the record and "factual differences" between this case and *Boyde*. Resp. Br. 32. Payton relies on this claim to find unreasonable each application by the California Supreme of *Boyde's* "context of the proceedings" analysis: that argument of counsel carries less weight than instructions from the court, that other instructions made it even more improbable a jury would misunderstand factor (k), that correct defense argument may be considered, and that a jury would be unlikely to disregard the only evidence presented. Resp. Br. 32-40. Payton's premise is wrong, however. The California Supreme Court's opinion itself demonstrates that the court considered all of the pertinent facts.

The very "factual differences" and "pertinent facts" that Payton insists were ignored were expressly considered in the opinion. For example, the California Supreme Court expressly addressed the prosecutor's erroneous argument (Pet. App. 159-62), whether factor (k) related to the crime or included non-crime related mitigation evidence (Pet. App. 160-61), the effect of the other instructions (Pet. App. 161), and the effect of the trial court's admonition (Pet. App. 162). To the extent certain facts were not specifically addressed in the majority opinion, they were fully discussed in Justice Kennard's dissent. Indeed, Payton's brief in this regard virtually echos Justice Kennard's dissent. Compare Resp. Br. 33-44 with Pet. App. 176-85. Payton cannot seriously suggest that a state supreme court majority did not even consider the issues raised in its own dissent. This readiness to attribute error where none plainly exists is precisely the type of analysis foreclosed by AEDPA. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

Payton's analysis is also incorrect for another reason. Like the Ninth Circuit (and Justice Kennard), Payton's "context of the proceedings" argument starts with the premise that, given the alleged inadequacy of factor (k), there was no instruction directing the jury to consider his mitigation evidence. Resp. Br. 33-34, 42. As a result, he reasons, the jury was left to decide

what the law was based on the conflicting arguments of counsel. And because Payton's jurors would not naturally consider post-crime character evidence of remorse and rehabilitation, the jury necessarily adopted the prosecutor's few misstatements advising them that factor (k) did not encompass Payton's evidence. Resp. Br. 35-41. Payton is wrong in each step of his reasoning. As discussed above, factor (k) directed the jury to consider Payton's character evidence, the jury was not forced to rely on counsel's arguments, and jurors would naturally have considered remorse and rehabilitation in determining punishment. *See*, § A(1), *supra*, and Pet. Br. 23-32.

Consequently, the California Supreme Court correctly identified the issue: Is there a reasonable likelihood the prosecutor's misstatements led the jury to understand the trial court's instructions as precluding consideration of Payton's mitigating evidence? Pet. App. 161. The California Supreme Court reasonably concluded there is not. To do so, Payton's jury would have had to ignore virtually the whole penalty phase. They would have had to ignore their duty to follow the law, which they were repeatedly advised was given to them by the trial court.[5/] The jury would have had to ignore the court's instructions to consider all of the evidence, to consider "any

---

5. The trial court and counsel repeatedly advised the jury, from voir dire through the penalty phase, that the trial court was the one responsible for instructing on the law and that statements of counsel were just argument, to be put in their proper perspective. *See, e.g.*, Reporter's Transcript of the trial court proceedings, Crim. No. 22151 ("RT") at 208, 346, 419, 802, 865, 928, 987, 993, 1114, 1129-30, 1141, 1242, 1306, 1794, 1832; J.A. 64, 69-70, 80-81, 85, 88. Additionally, the trial court gave the jury the following written instruction before their deliberations at the penalty phase: "Your . . . duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict. ¶ It is my duty in these instructions to explain to you the rules of law that apply in this case. You must accept and follow the rules of law as I state them to you." Pet. App. 106; Clerk's Transcript of the underlying trial court proceedings, Crim. No. 22151 ("CT") at 329 (CALJIC No. 1.00 (1979 Rev.)).

other circumstance which extenuates the gravity of the crime," and to put the prosecutor's argument in perspective. Further, the jury would have had to ignore the attention given by both parties to the value of Payton's mitigating evidence. Finally, the jury would have had to disregard their long held societal beliefs that remorse and rehabilitation are relevant mitigating factors when deciding the appropriate punishment. Under these circumstances, it is not reasonably likely a jury would have refused to consider Payton's mitigating evidence simply because the prosecutor stated that, to him, factor (k) did not mean anything that happened after the crime was committed.[6/] In this regard, it bears repeating that the relevant legal issue is the jury's understanding of the court's instructions. Payton's diversionary discussion about what transpired outside the presence of the jury between the court and counsel regarding the prosecutor's understanding of factor (k) is utterly irrelevant to the question of what the jury understood.

Lastly, the jury's questions during deliberations leave no doubt that they considered Payton's mitigating evidence. The jury asked whether "life imprisonment without the possibility of parole mean[s] under no circumstances will the defendant be paroled" and whether "future law changes affect him retroactively?" CT 441. The only basis for considering whether to keep Payton alive was his post-crime character evidence of remorse and rehabilitation. There was no mitigating evidence presented at the guilt phase. The only other evidence before the jury consisted of aggravating circumstances such as Payton's unprovoked, vicious attacks on three vulnerable people (guilt phase), his senseless and violent attack on his former girlfriend (J.A. 5-10), and Payton's uncontrollable urge to rape and stab women (J.A. 11-12). Under California's sentencing scheme the

---

6. Each time the prosecutor referred to factor (k) he made it clear that he was talking about what factor (k) meant to *him*. J.A. 68, 70. This type of preface only reinforced what the jury already knew: that his argument was a statement of an advocate and not the law.

trier of fact is required to impose the death penalty where the aggravating circumstances outweigh the mitigating. Cal. Penal Code § 190.3; Pet. App. 189-90; J.A. 95-96. If Payton's jury actually believed that they were *precluded* from considering Payton's mitigating evidence then they had to impose death and there was no reason to ask their questions. They asked about the possibility of parole because they were necessarily considering Payton's mitigating evidence. Accordingly, the California Supreme Court correctly found that there is no reasonable likelihood the jury misunderstood the court's instructions so as to *preclude* consideration of his evidence.

In any event, it was at least reasonable for the California Supreme Court to so find. Unlike *Boyde's* specific holding concerning factor (k), *Boyde's* analytical framework for assessing claims that the "context of the proceedings" led a jury to misunderstand the court's instructions so as to preclude consideration of constitutionally relevant mitigating evidence is general in nature and state courts thus have a good deal of leeway in reaching reasonable outcomes. *Yarborough v. Alvarado*, 124 S. Ct. at 2149. In other words, the range of reasonable judgment is greater and entitled to more deference under AEDPA. *Id.* Given that the California State Supreme Court considered the proper factors, its decision was necessarily reasonable and entitled to deference.

C. Any Error Was Harmless

Payton also argues that any error was not harmless. Resp. Br. 44-45. Even assuming arguendo there was error, any error was necessarily harmless. Habeas relief based on trial error is available only when that error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotations and citations omitted). "This standard reflects the presumption of finality and legality that attaches to a conviction at the

conclusion of direct review. It protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged." *Calderon v. Coleman*, 525 U.S. 141 (1998) (per curiam) (internal quotations and citations omitted).

Here, the evidence in aggravation was overwhelming. For no other reason than to quench his thirst for raping and stabbing women, Payton brutally raped and stabbed to death twenty-one year old Pamela Montgomery as she lay in her bed. P.A. 142-43. He then went to Patricia Pensinger's bedroom, a woman whom he called a friend and who had graciously allowed him into her home in the early morning hours of May 26, 1980, and stabbed her about the face, neck and back forty times. P.A. 141-42. Despite her pleas to spare her son, Payton also wielded his knife on her ten year old son Blane.[7] He inflicted twenty-three stabs wounds to Blane's face, neck and back. P.A. 141-42. He did not stop his attack until it appeared that help was on the way. P.A. 142. Payton then fled and was eventually caught in Florida a month later. P.A. 142-43; RT 1731-34 (California police arrested Payton in Florida on June 25, 1980).

Payton did not suffer from a mental illness or a troubled childhood. Nor was he a generally good person who did one heinous act out of character. He was also ably defended by competent counsel. As noted by the dissent in this case, "[o]n this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980." P.A. 43.

Additionally, there is no question the jury heard Payton's mitigating evidence and that jurors naturally consider remorse and rehabilitation in determining sentencing regardless of the instructions. *See*, § A, *supra*. Nevertheless, the jury could have

---

7. This is the correct spelling of Blane's name. It has been misspelled as "Blaine" in various pleadings and opinions.

reasonably doubted the sincerity of Payton's remorse and rehabilitation given it did not occur until after he was caught and arrested a month later while living in Florida. Even if they concluded Payton was sincere, the mitigating effect of his belated remorse and rehabilitation was insignificant in relation to the acts that he committed. Under these circumstances, any error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 637.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Dated: October 27, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General

A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
Counsel for Petitioner